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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JACQUELYN FRIES, a Minor, etc., Plaintiff and Appellant, v. RITE AID CORPORATION et al., Defendants and Respondents.	A120488 (City & County of San Francisco Super. Ct. No. CGC06448833)

Must a defendant who seeks costs after a plaintiff's voluntary dismissal file a proposed judgment in addition to its memorandum of costs? We conclude that there is no legal requirement that a defendant file a proposed judgment. The trial court correctly denied plaintiff Jacquelyn Fries's motion to tax or strike costs, and we affirm the order and judgment awarding costs. However, we reverse two discovery orders issued after the case was dismissed because they were void due to the trial court's lack of jurisdiction.

BACKGROUND

Fries, a minor, filed this action against Rite Aid Corporation and Richard Green through her guardian ad litem. The complaint alleged that Green, a Rite Aid security guard, detained and sexually molested Fries under the pretext that he was investigating a shoplifting incident.

On September 4, 2007, Fries filed a request for dismissal of the entire action without prejudice. She filed and served notice of entry of dismissal on September 10, 2007. On September 10 and September 12, 2007, Rite Aid and Green filed their respective memoranda of costs. Fries responded with a motion to strike or tax costs, in

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II and III.

which she argued the memoranda of costs were procedurally defective because defendants failed to file proposed judgments or orders of dismissal when they filed the memoranda. Alternatively, she asserted that certain costs were not allowable, were unreasonable in amount, or were not reasonably necessary to the conduct of the litigation.

Several weeks before the hearing on the motion to strike or tax, Green sent the court a proposed judgment of dismissal. His cover letter explained: "As you know, the plaintiff has made much of some requirement that the defendants submit a proposed judgment with their cost bill. Although we do not concede this claim, out of an excess of caution, we did submit a proposed judgment. Thereafter, we received endorsed copies of all that we filed except the proposed judgment, which was returned with a note from the Clerk saying that the Clerk will not file this until after costs have been determined and that we need to insert the amount awarded by the Court before submitting the judgment."

The court rejected Fries's contention that defendants' failure to submit a proposed judgment with their costs memoranda barred recovery. The court noted that defendants complied with rule 3.1700 of the California Rules of Court[1] and observed that a practice guide Fries relied upon to argue the defendants were required to submit a proposed judgment "is interesting but . . . does not address the plain language of [rule] 3.1700 . . . ." The court taxed $2,638.96 of Rite Aid's claimed costs but otherwise approved both parties' costs bills.

Green and Rite Aid submitted a proposed judgment that declared the action was dismissed without prejudice and awarded costs of $11,741.87 and $4,372.55 to Rite Aid and Green, respectively. This appeal timely followed.

DISCUSSION

I. *The Necessity for a Proposed Judgment Prior to an Award of Costs*

Fries contends the trial court was required to deny all claimed costs because defendants did not file a proposed judgment together with their costs memoranda. We disagree.

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[1] All further references to rules are to the California Rules of Court.

Rule 3.1700 governs the procedure for claiming costs. In relevant part, it provides: "A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first." (Rule 3.1700(a)(1).)[2] Defendants complied with rule 3.1700 when they filed memoranda of costs within 15 days after the date the notice of entry of dismissal was served. The question is whether, as Fries maintains, defendants were also required to file a proposed judgment along with their memoranda of costs, even though rule 3.1700 does not provide that they must do so. Neither the cases nor the practice guide Fries cites to support her position are persuasive.

In *Boonyarit v. Payless Shoesource, Inc.* (2006) 145 Cal.App.4th 1188, the plaintiff filed an amended complaint that omitted six defendants named in a previous complaint, including Payless. She then attempted to voluntarily dismiss those six defendants without prejudice, but the court clerk rejected her request for dismissal because she had not correctly completed the form. The error was never corrected and no dismissal was entered. Payless nonetheless filed a costs memorandum and was awarded costs. On appeal, the plaintiff contended that Payless should not have been awarded costs because there was no order or judgment of dismissal. (*Id.* at p. 1192.)

The Court of Appeal reversed. Rule 870, the predecessor of rule 3.1700, "contemplates the entry of a dismissal or judgment as a predicate to a costs award." (*Boonyarit v. Payless Shoesource, Inc.*, *supra*, 145 Cal.App.4th at p. 1192.) In *Boonyarit* the necessary predicate was absent because the clerk rejected the dismissal form. "A dismissal is entered when it is entered in the clerk's register; it is thereafter effective for all purposes." (*Ibid.*) The court also rejected the argument that the amended complaint

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[2] Other provisions of rule 3.1700 address verification requirements, procedures for seeking costs after a default judgment (rule 3.1700(a)(2)), time and form requirements for motions to strike and tax costs, extensions of time, and the clerk's entering of costs on the judgment.

operated "in substance" as a dismissal of Payless for purposes of costs because "it cannot invoke the statutory right to costs until the dismissal has been perfected *through entry of an order or judgment of dismissal*." (*Id.* at p. 1193, italics added.) But in this case, unlike in *Boonyarit*, a dismissal *was* entered. *Boonyarit*, therefore, is inapposite.

Nor does *Sanabria v. Embrey* (2001) 92 Cal.App.4th 422 support Fries's argument. There, Sanabria sued the Embreys. Scherer intervened in the action, and Sanabria cross-complained against Scherer. Sanabria later voluntarily dismissed the Embreys without prejudice and, on December 1, 1999, served and filed a notice of entry of dismissal as to them. Scherer's complaint-in-intervention and Sanabria's cross-complaint were subsequently resolved and notice of entry of judgment in favor of Scherer was served on May 3, 2000. (*Id.* at p. 424.) The Embreys filed a memorandum of costs 16 days later. (*Ibid.*)

The Court of Appeal held the Embreys' costs memorandum was untimely because it was not filed within 15 days from service of the notice of entry of dismissal. (*Sanabria v. Embrey*, *supra*, 92 Cal.App.4th at pp. 425-426.) Although the cross-actions between Scherer and Sanabria remained pending, the dismissal of the Embreys was effective when entered. Service of notice of entry of the dismissal therefore triggered their time within which to file their memorandum of costs, and that time expired long before the litigation between Scherer and Sanabria ended in the judgment noticed in May 2000. (*Id.* at p. 426.)

No such lapse of time between dismissal and the costs memoranda occurred here, and Fries does not contend otherwise. Instead, Fries relies on *Sanabria* and *Boonyarit* because both cases, in dictum, refer to a passage in Weil and Brown's Civil Procedure Practice Guide. It says: "Ordinarily, a judgment or order must be entered upon which a costs award may be based. [Citations.] [¶] But the mechanics for obtaining a judgment or order awarding costs after a voluntary dismissal are not clear: [¶] CRC 3.1700(a)(1) states: 'A prevailing party who claims costs shall serve and file a memorandum of costs . . . (within specified time) after service of written notice of entry of *judgment or dismissal* . . . .' But this provision seems to refer to *involuntary* rather than voluntary

dismissals because it refers to CCP §664.5 (which has no application to voluntary dismissals). [See *Boonyarit v. Payless Shoesource, Inc.*, *supra*, 145 CA4th at 1192, 52 CR3d at 243 (citing text)].] [¶] Therefore, apparently, defendant's memorandum of costs must be filed *together with* a proposed *judgment* of dismissal. [*Sanabria v. Embrey* (2001) 92 CA4th 422, 425, 111 CR2d 837, 839 (citing text).]" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) [¶][¶] 11:38 to 11:38.2, pp. 11-22 to 11-23.)

Fries's reliance on this commentary is not persuasive. We find the rationale for the oddly tentative suggestion that a proposed judgment is "*apparently*" required to be unconvincing. The practice guide reasons that rule 3.1700(a)(1) "seems to refer to *involuntary* rather than voluntary dismissals *because it refers to CCP § 664.5*." (First italics in original, second italics added.) But the reference to Code of Civil Procedure section 664.5[3] does not create the ambiguity the authors of Weil and Brown suggest it does. Rule 3.1700(a)(1) is phrased in the disjunctive: "A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after [1] the date of mailing of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 *or* [2] *the date of service of written notice of entry of judgment or dismissal, or* [3] within 180 days after entry of judgment, whichever is first." (Bracketed numbers and italics added.) The reference to Code of Civil Procedure section 664.5 (which concerns involuntary dismissals) modifies only the *first* of three alternative deadlines. Weil and Brown's observation that the *second* deadline, running from service of written notice of entry of judgment or dismissal, does not apply to *voluntary* dismissals therefore does not follow. Nor is the distinction Weil and Brown seek to apply supported by the cited cases, *Boonyarit* or *Sanabria.* Neither holds that a voluntarily dismissed defendant must file a proposed judgment of dismissal together with the memorandum of costs.

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[3] All further statutory references are to the Code of Civil Procedure.

Fries also argues that the requirement for a judgment follows from a 1958 case, *MacLeod v. Tribune Publishing Co.* (1958) 157 Cal.App.2d 665. We disagree. The Legislature has expressly directed that prejudgment costs "shall be claimed and contested in accordance with rules adopted by the Judicial Council." (§ 1034, subd. (a).) In 1987, almost 30 years after *MacLeod*, the Judicial Council adopted the predecessor of rule 3.1700 that governed the procedures for claiming prejudgment costs. Nothing in rule 3.1700 or its predecessor suggests a defendant must file a proposed judgment along with a memorandum of costs in order to recover its costs after a voluntary dismissal.

MacLeod has lost currency since 1958 for a second reason as well. The adoption of former rule 870 undermined its ratio decidendi. The *MacLeod* court concluded that an entry in the clerk's register that showed a request for dismissal was filed was not, without more, a "judgment" sufficient to start the time running for the period to file a memorandum of costs under former section 1033.[4] Instead, the *MacLeod* court reasoned, the "judgment" that starts running the time for claiming costs must be the order of dismissal, because, at that time, "To hold otherwise would be to place the burden upon a person involved in any litigation of constantly checking the clerk's records to see whether or not a dismissal has been entered without notice to him." (*MacLeod v. Tribune Publishing Co., supra,* 157 Cal.App.2d at pp. 667-668.) The adoption of rule 870, now 3.1700, obviated the problem identified in *MacLeod* by predicating its 15-day period within which to file a costs bill upon notice to the defendant of entry of dismissal.

In any event, if *MacLeod* could be viewed to require a dismissed defendant to obtain a *court order of dismissal* before filing a costs bill—a view we do not espouse—even then, it would not support Fries's rather different claim that a costs bill must be stricken unless it is filed together with a proposed judgment. The trial court was correct

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[4] At that time, section 1033 provided in part: " 'In superior courts . . . the party in whose favor the judgment is ordered, and who claims his costs, must serve upon the adverse party, and file at any time after the verdict or decision of the court, and not later than ten (10) days *after the entry of the judgment*, a memorandum of the items of his costs and necessary disbursements . . . .' " (*MacLeod v. Tribune Publishing Co., supra*, 157 Cal.App.2d at p. 667, italics added.)

to conclude that a dismissed defendant seeking costs pursuant to rule 3.1700 is not required to file a proposed judgment along with its memorandum of costs.

II. *The Ruling on Fries's Motion to Tax Costs Was Within the Court's Discretion*

Fries contends that even if the court was not required to strike defendants' memoranda, the court abused its discretion when it declined to strike certain of defendants' claimed costs. We disagree.

"If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs. [Citations.] Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion." (*Ladas v. California State Auto Assn.* (1993) 19 Cal.App.4th 761, 774.)

Fries asserts the court should have disallowed $813.42 in costs incurred by Rite Aid's counsel associated with taking Fries's deposition in Nevada City because, she maintains, she could have been deposed in San Francisco. Alternatively, she argues that $813.42 is an unreasonable amount for travel between San Francisco and Nevada City. But Rite Aid explained that: (1) it deposed Fries near her home in Nevada City as an accommodation to her to assuage her concerns about missing school; and (2) Fries's counsel never voiced any opposition to the Nevada City venue. The trial court did not "exceed[] the bounds of reason, all of the circumstances before it being considered" (*Loomis v. Loomis* (1960) 181 Cal.App.2d 345, 348-349) when it credited this explanation and found $813.42 to be reasonably incurred travel expenses for the two day deposition.

Fries next complains that the court improperly awarded Rite Aid $175 for deposition costs related to witness Rosalie Whitlock because Whitlock was never deposed. Rite Aid explained that it incurred a $175 cancellation fee charged by the court reporter after Whitlock canceled her deposition at the last minute. It was within the

court's discretion to allow this as a reasonable and necessary cost. (§ 1033.5, subd. (c)(4).)

Fries also contests Rite Aid's recovery of $835 for service of process on 13 witnesses. She contends the court should have disallowed the cost of serving two of those witnesses—her parents—because they would have appeared for deposition without having been served. But Fries had objected to a scheduled deposition of her father *precisely because he had not been subpoenaed*. It was, therefore, entirely reasonable for Rite Aid to ensure the witnesses, including plaintiff's parents, would attend depositions by serving them with process. And, while Fries asserts the testimony of the remaining witnesses (10 of her schoolmates and a physician) was unnecessary, she has not demonstrated that their anticipated testimony was not relevant for discovery purposes or reasonably calculated to lead to the discovery of admissible evidence.[5] (§ 2017.010; see, e.g., *Stewart v. Colonial Western Agency, Inc*. (2001) 87 Cal.App.4th 1006, 1013.)

Fries's remaining challenges to the awarded costs merit only brief discussion. She argues Rite Aid and Green should each be taxed $1,433.33 for the cost of private mediation because this was merely a "voluntary" expenditure. She is incorrect. The parties stipulated to mediation in lieu of participating in a *mandatory* court settlement conference through the San Francisco Superior Court Early Settlement Program, and, in fact, the parties were later ordered to show cause why the case was not in mediation. This cost was hardly voluntary.

Also "reasonably necessary" costs incurred in the litigation, as is clear from the record, were: (1) administrative fees for the Early Settlement Program, which the parties were required to pay regardless of actual participation in the program; (2) payments to various litigation services providers (primarily Complex Legal Services and Quest Discovery Services) for document subpoenas and records, witness fee costs associated with the same, and process server fees. It was within the court's discretion to allow these

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[5] Apparently none of these depositions went forward before Fries dismissed the action.

costs under sections 1033.5, subdivisions (a)(4) (service of process) and (c)(4) (items allowable in the court's discretion). Fries's challenge to these costs because Rite Aid listed some of them in the wrong places on the Judicial Council form is meritless. Rite Aid fully explained and substantiated the nature of these costs in its opposition to the motion to tax costs.

III. *The Postdismissal Orders Are Void*

Fries also challenges two discovery orders that were issued after she voluntarily dismissed this action. She says the orders are void for lack of jurisdiction. We agree, and therefore reverse the discovery orders.

A. *Background*

We need not go into the particulars of the discovery battle that culminated in an order denying Fries's motion to "retake" defendant Green's deposition. The motion was set for hearing at 9:00 a.m. on September 4, 2007. On August 31, 2007, the discovery commissioner issued a tentative ruling denying the motion. Fries notified the defendants of her intent to appear and contest the tentative ruling. Instead, at 8:02 on the morning of the scheduled hearing she filed her request for voluntary dismissal. The hearing nonetheless proceeded as noticed, and the court adopted its tentative order. On September 14, 2007, over Fries's objection on the basis that her voluntary dismissal had terminated the court's jurisdiction, the court signed Rite Aid's proposed order on the discovery motion.

On September 18, 2007, Rite Aid filed a motion to (1) strike and seal a declaration and brief submitted by Fries in support of her motion to retake the Green deposition, and (2) sanction Fries's counsel for filing allegedly scurrilous and defamatory statements. The court denied the motion on October 30, 2007.

B. *Analysis*

Fries is correct that the two orders issued after her case was dismissed are void for lack of jurisdiction. Section 581 allows a plaintiff to voluntarily dismiss an action, with or without prejudice, before the "actual commencement of trial." (§ 581, subds. (b)(1), (c).) " 'Apart from certain . . . statutory exceptions, a plaintiff's right to a voluntary

dismissal [before commencement of trial pursuant to section 581] appears to be absolute. [Citation.] Upon the proper exercise of that right, a trial court would thereafter lack jurisdiction to enter further orders in the dismissed action.' [Citation.] Alternatively stated, voluntary dismissal of an entire action deprives the court of both subject matter and personal jurisdiction in that case, except for the limited purpose of awarding costs and statutory attorney fees. [Citations.] 'An order by a court lacking subject matter jurisdiction is void.' " (*Gogri v. Jack In The Box Inc.* (2008) 166 Cal.App.4th 255, 261, fn. omitted.)

Against this clear authority, defendants argue the ruling on the motion to retake Green's deposition preceded the dismissal because the *tentative* order was issued five days before Fries dismissed the action. "Thus, when Commissioner Chan signed the order on September 14, 2007, he effectively *confirmed* entry of his own, earlier ruling in the case." Alternatively, they attempt to characterize September 14, 2007, as "nothing other than a *nunc pro tunc* entry" of the tentative ruling. Both arguments—for which defendants provide no authority—misconstrue the nature of a tentative ruling. A tentative ruling is, definitionally, not the court's final order. Where (as happened here) a party timely notifies the court and other parties of its intent to appear and oppose the tentative ruling, the tentative ruling will not become the final ruling of the court until the hearing—if at all. (Rule 3.1308; San Francisco Superior Court Local Rule 8.3.) In this case, Fries entered her voluntary dismissal before there was such a ruling. "When a dismissal has properly been filed, the trial court loses jurisdiction to act . . . ." (*Tire Distributors, Inc. v. Cobrae* (2005) 132 Cal.App.4th 538, 542.) Accordingly, once the dismissal was filed the court had no authority to convert its tentative ruling into a final order.

Defendants also contend the effect of the dismissal must be "limited" as a matter of logic, fairness and respect for judicial resources so as to prevent Fries from manipulating the tentative ruling system by dismissing her action because she received an adverse tentative ruling. Their authorities for this contention are not on point. A long series of opinions explain the exceptions to the statutory right of a plaintiff to voluntarily

dismiss before trial commences when: (1) there has been a "public and formal indication by the trial court of the merits of the case"—such as a tentative ruling on a dispositive motion; or (2) there has been " 'some procedural dereliction by the dismissing plaintiff that made dismissal otherwise *inevitable*.' " (*Gogri v. Jack In The Box Inc.*, *supra*, 166 Cal.App.4th at pp. 261-262, citing *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 200-205;[6] see, e.g., *Cravens v. State Bd. of Equalization* (1997) 52 Cal.App.4th 253 [no dismissal when entry of adverse summary judgment was merely a formality]; *Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765 [no dismissal after adverse tentative ruling on summary judgment]; *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168[7] [no dismissal just prior to hearing on terminating sanctions]; see generally Weil & Brown, *supra*, [¶][¶] 11.25-11.25.20, pp. 11-11 to 11-14.) Despite some uncertainty in their precise parameters, these exceptions generally arise only when the action has proceeded to a determinative adjudication, or to a decision that is "tantamount to an adjudication." (*Harris v. Billings* (1993) 16 Cal.App.4th 1396, 1402.) In contrast, the discovery rulings at issue here merely related to Fries's efforts to take a deposition. Defendants observe that Fries's opposition to a pending summary judgment motion was due October 1, 2007, and they speculate that her inability to depose Green condemned her opposition to defeat. But defendants' speculation is no substitute for a decision "tantamount to an adjudication." Defendants cite no case, and our research has disclosed none, in which an adverse ruling on a non-dispositive discovery motion that may be relevant to but is not necessarily determinative of an anticipated summary judgment motion has been held to foreclose a plaintiff's statutory right to dismiss.

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[6] *Franklin Capital Corp. v. Wilson*, *supra*, 148 Cal.App.4th at pages 200-205 provides a thorough and cogent analysis of the law on this issue, analyzing the relevant cases and distilling from them a sensible, coherent and readily articulable rule of law.

[7] *Hartbrodt* is something of an outlier because the impending *discretionary* dismissal was not inevitable, as observed in *Franklin Capital Corp. v. Wilson*, *supra*, 148 Cal.App.4th at pages 205-206. Even so, dismissal was the likely result of the pending motion.

Defendants' argument is curious for another reason. If the rule summarized in *Gogri* and *Franklin* applies (which it does not), then Fries's dismissal was invalid because her right to dismiss was foreclosed by the tentative ruling. In that case, the subsequent discovery orders are *not* void—but the basis for defendants' costs awards also disappears. This would seem to be a poor bargain, and, in fact, it is not what defendants appear to be seeking. Instead, it seems defendants would like this court to find the dismissal sufficiently valid to support their costs awards, but not so valid as to deprive the court of jurisdiction to rule on the discovery motions.[8] Not surprisingly, they cite no law for this "a little bit dismissed" theory.

We conclude: (1) Fries's right to dismiss was not terminated by the tentative ruling on her discovery motion; (2) her voluntary dismissal was valid; and (3) the court was therefore without jurisdiction when it issued the September 14 and October 30, 2007, orders. Accordingly, those orders are void.

DISPOSITION

The order and judgment awarding costs are affirmed in their entirety. The postdismissal discovery orders are void and, therefore, are reversed. Parties are to bear their own costs on appeal.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.

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[8] Motion, actually. Defendants make no mention of the October 30, 2008, order, which comes as no surprise given that the court ruled against them.

Trial Court:	Superior Court of the City and County of San Francisco
Trial Judge:	Patrick Mahoney
Counsel for Appellant:	Joseph L. Schatz
Counsel for Respondents:	Kelly, Hockel & Klein Jonathan Allan Klein Thomas K. Hockel